IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-29

PETER M. ROBERTS,
Plaintiff-Petitioner,

vs.

SEARS, ROEBUCK AND CO.,
Defendant-Respondent.

BRIEF OF SEARS, ROEBUCK AND CO. IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI FILED BY PETER M. ROBERTS.

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INTRODUCTION.

In its petition for a writ of certiorari, defendant has set forth the reasons why the verdict awarded by the jury cannot stand. In an obvious effort to create a smoke screen and obscure the crucial issues raised by defendant's petition, plaintiff has filed what he labels a "conditional" cross petition for a writ of certiorari. By so doing and by raising frivolous issues, plaintiff no doubt hopes this Court will be deterred from defendant's petition. However, the speciousness and transparency of plaintiff's position is clear, not only from a reading of his petition, but also from the very fact of his request that it be considered only if defendant's petition is accepted by this Court.[1]

1. Defendant refers to the footnote of plaintiff's cross petition at page 3.

In his so-called "conditional" cross petition, plaintiff asks this Court to increase a $1,000,000 verdict which a jury found and the Court of Appeals subsequently agreed represented defendant's profits from a patent which, as can be seen from defendant's petition for a writ of certiorari is invalid.[2] Plaintiff asks that this verdict be increased without a new trial. In other words, plaintiff asks for an additur, a procedure which would clearly violate defendant's constitutional right to a jury trial.

Plaintiff's jurisdictional statement and statement of the case at pages 1-10 of his cross petition are no more than a mixed bag of innuendo, conclusions, arguments and "facts" unsupported by and contrary to the record. For example, plaintiff asserts that the evidence unequivocally disclosed defendant's profits to be, and required a jury verdict of, $44,000,000. This argument is directly contrary to the record which includes the testimony of plaintiff's own witnesses who conceded they did not know the selling price of defendant's wrenches (T 1410, 1677, 1679-1680, 1682, 1683). They therefore could not appropriately determine defendant's net incremental profit on the wrench.

So too, plaintiff argues that the jury was improperly instructed on damages and that for this reason did not award him defendant's profits. This argument is also misplaced. The instruction that plaintiff complains of was tendered by him and, in any event, clearly required an award of and the Court of Appeals found that the jury awarded him defendant's profits.

2. Defendant of course submits that it could not have profited at all from the use of this invalid patent as a matter of law.

ARGUMENT.

I.

An Increase in the Jury Award Will Unconstitutionally Deprive Defendant of Its Right to a Jury Trial.

Defendant was entitled to a jury trial under the Seventh Amendment to the United States Constitution. Equally important, plaintiff, throughout every stage of this lawsuit, insisted on a jury trial. Now, apparently dissatisfied with the jury's verdict, plaintiff asks this Court, as he did the Court of Appeals, to vacate it and, without a new trial, substitute a higher verdict.[3] The trial court recognized that it was without power to do so and the Court of Appeals agreed. The Court of Appeals also ruled that to increase the verdict would be completely unfair to defendant. 573 F. 2d at 895.

More importantly, any increase in the jury verdict granted by this or any court would deprive the defendant of its right to a trial by jury under the United States Constitution. It is a basic Constitutional maxim that no jury award may be increased by a trial or reviewing court without the joint consent of plaintiff and defendant. Thus, in the landmark decision of *Dimick* v. *Schiedt*, 293 U. S. 474, 79 L. Ed. 603 (1935), this Court ruled that an increase in a jury verdict with the consent of the defendant alone violated the plaintiff's constitutional rights, holding:

> But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. *When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that the court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end*

3. Plaintiff does not now ask for, and, indeed, in his post-trial motion and again in his brief before the Court of Appeals expressly stated that he does not want a new trial.

> *in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept "an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."* 293 U. S. at 486, 487 (emphasis added).

This rule has repeatedly been applied in favor of a defendant as well. In *DePinto* v. *Provident Security Life Insurance Co.*, 323 F. 2d 826 (9 Cir. 1963), *cert. denied sub nom. Gorsuch* v. *DePinto*, 376 U. S. 350 (1964), where, as here, the jury decided damages in a case that involved a mixture of legal and equitable causes of action, the court of appeals reversed a trial court's increase of a jury award when it ruled:

> What the trial court did in the instant case was not additur in the technical sense. There was no motion by plaintiff for a new trial, the trial court did not grant such a motion unless defendants consented to the awards which were actually entered, the defendants did not consent to such awards, and plaintiff is not the party who is complaining about what the court did. *But, insofar as the Seventh Amendment right to a trial is concerned, the reasoning which forbids additur just as clearly forbids an unconditional award of damages in excess of a jury verdict in an amount which, although agreeable to plaintiff, is not consented to by defendant.*
>
> In the case of additur, the Constitutional right of the plaintiff to a jury trial is brought to an end, while in our case *the Constitutional right of the defendant is likewise terminated.* What the court said, in Dimick, concerning such an impairment of a plaintiff's right to a jury trial is equally applicable where it is the defendant's right which is impaired.
>
> We therefore hold that the trial court was *without power* to enlarge the jury awards against [the defendants], or to make an award against [the defendants] who had escaped any jury award. 323 F. 2d at 838 (footnote omitted, emphasis added).

Again, in *United Airlines Inc.* v. *Wiener*, 335 F. 2d 379 (9 Cir. 1964), the Court of Appeals ruled:

> Strictly speaking, additur is not involved here since United's consent to the increase was neither requested nor given. *A fortiorari*, however, the principles announced in Dimick have pertinence here [citations omitted].
>
> * * * * *
>
> The teachings of the Dimick and Walker cases seem to us to include the following: *an increase by a court of the jury's assessment of damages which is a bald addition of something which in no sense can be said to be included in the verdict is violative of the Seventh Amendment. . . .* 335 F. 2d at 406, 407 (emphasis added).

In *United States* v. *93.970 Acres of Land*, 258 F. 2d 17 (7 Cir. 1958), *rev'd on other grounds*, 360 U. S. 320 (1959), the Seventh Circuit ruled that the trial court did not have the power to increase a jury award, even where defendant had *no* constitutional right to a jury trial:

> We agree that parties to a condemnation suit have no constitutional guarantee to a jury trial but, even so, it does not follow that the Court, absent consent of the parties, has the authority to increase a jury verdict by additur or decrease it by remittitur. 258 F. 2d at 31.

See also, Milprint, Inc. v. *Donaldson Chocolate Co.*, 222 F. 2d 898 (8 Cir. 1955); *Southern Farm Bureau Casualty Ins. Co.* v. *Palmer*, 263 F. 2d 206 (5 Cir. 1959); *New Orleans and Northeastern R. R. Co.* v. *Hewett Oil Co.*, 341 F. 2d 406 (5 Cir. 1965); *Silverman* v. *Travelers Insurance Co.*, 277 F. 2d 257 (5 Cir. 1960).

The Illinois decisions also follow this basic doctrine and have applied the rule even where a jury award is lower than a stipulated amount of damages. Thus, in *Paul Harris Furniture Co.* v. *Morse*, 7 Ill. App. 2d 452, 130 N. E. 2d 16 (1955), *rev'd on other grounds*, 10 Ill. 2d 28, 139 N. E. 2d 275 (1956), the Illinois Appellate Court ruled:

We believe if the judgments as prayed for in their respective motions were entered there would be in the language of Hughes v. Bandy, 404 Ill. 74 at page 80:

> *"A wrongful exercise of judicial power and authority which, in effect, deprived the defendant of a right of trial by jury."*
>
> . . . We further held that this was true even though the only relief sought by the motion was judgment for a *stipulated amount of damages* which was greatly in excess of the amount returned by the jury. This decision was affirmed by the Supreme Court in Hughes v. Bandy, supra. We believe this decision applicable here. . . . Plaintiffs therefore cannot attack the verdict by a motion for judgment notwithstanding even if the attack is confined to the amount of damages allowed and *that amount was stipulated as plaintiffs assume.* (*McCaskill* v. *Quintano,* 350 Ill. App. 374.) 7 Ill. App. 2d at 472-473 (emphasis added).

Again, in *McCaskill* v. *Quintano,* 350 Ill. App. 374, 113 N. E. 2d 72 (1953), the Illinois Appellate Court ruled that the trial court did not have the power to enter a judgment for an amount larger than the jury awarded when it ruled:

> The answer of defendant set up a complete defense to the plaintiff's claim, so that the liability of the defendant, if there was any evidence to support it, became a question of fact for the jury. Under such circumstances *the court had no power,* upon the motion for judgment *non obstante veredicto,* to enter the judgment for a larger amount.
>
> The identical question here presented was decided adversely to plaintiff in *Hughes* v. *Bandy,* 336 Ill. App. 472, affirmed in 404 Ill. 74. In the case cited liability was denied, but the damages, amounting to $1,218.25, were undisputed. The verdict returned was $615. *The court held that notwithstanding the fact that the damages were not in dispute, the court lacked the power upon such a motion to enter a judgment for the larger amount, and that the wrongful exercise of the judicial authority in effect deprived the defendant of the right of trial by jury.* The court further held that since plaintiff did not see fit to make a motion for new trial . . ., he is deemed to have waived the right to apply for a new trial and in consequence is barred from challenging the amount of the jury's verdict. 350 Ill. App. at 377-378 (emphasis added).

Also, in *American Appraisal Co.* v. *Pio,* 246 Ill. App. 467 (1927), the Appellate Court ruled again that the courts were powerless to alter a jury verdict:

> Plaintiff insists that the verdict should have been for the full amount of its claim, $713.53, and requested the trial judge to change the verdict to that amount, which the court refused to do, *as he had no power to change the verdict in any respect,* except to set it aside and award a new trial. Now Plaintiff asks this court to enter a judgment here for $713.53. This we have no power to do. We might reverse the judgment and remand the cause for a new trial, but plaintiff does not ask us so to do, and has not assigned any cross errors. 246 Ill. App. at 471 (emphasis added).

It is clear from the decisions of this and all other courts which have passed on the subject that the courts below were, as this Court is, without power to increase the jury award of $1,000,000, and that to grant the relief "conditionally" sought by plaintiff would clearly deprive defendant of its rights under the Seventh Amendment to the United States Constitution. Plaintiff cites no case which has held to the contrary, and defendant knows of no such decision. For this reason alone plaintiff's request for an increase in the jury award must fail.

II.

The Jury Award Cannot Be Increased in This Case Because Plaintiff Is Not Entitled to More Damages Under the Evidence.

Even if plaintiff did request a new trial, and he has not, or this Court were somehow empowered to increase the jury verdict without a new trial, which it is not, there would be no merit to plaintiff's position. Defendant's profit on the wrench was certainly not, as plaintiff asserts, $44,000,000. Indeed, its profit did not even approach the $1,000,000 jury award.

Defendant's net profit, of course, can only be determined from the selling prices of the wrench. In some instances, its wrenches were sold as individual items through defendant's catalogs in which the selling price was disclosed. One of plaintiff's witnesses developed a specious $44,000,000 profit figure by assuming, contrary to the facts, that *all* defendant's quick release wrenches were sold at the stated catalog price (T. 1653, 1675-1676) and by merely multiplying the number of wrenches sold by the difference between the manufacturing cost and the occasional catalog selling price (T. 1657-1670, 1676-1677). However, he, as well as other witnesses, readily conceded that he did not know how many of the wrenches were actually sold at the stated catalog selling price, how many wrenches were sold at reduced sale or promotional prices in retail stores, or how many of them were included in tool sets (T. 1410, 1677, 1679-1680, 1682, 1683). Plaintiff's witnesses further conceded, and indeed it is undisputed, that each of the foregoing factors would substantially reduce the profit margin on the wrenches, thus rendering the $44,000,000 figure entirely speculative (T. 1677-1679).

The uncontroverted and unrebutted evidence reveals that only a bare minimum number of wrenches were sold at the catalog price. Indeed, more than two-thirds of the wrenches were included in tool sets that contained hundreds of tools (T. 1782-1783). Each of these tool sets contained only one or two quick release wrenches (T. 1411, 1687-1688, 1781, 1782) and plaintiff's own witness conceded that it is not possible to allocate any specific profit figure to a wrench when it is sold in a tool set. Indeed, the sets themselves are frequently sold at drastically reduced prices (T. 1409-1410, 1412-1413, 1528, 1683). Moreover, a substantial number of those remaining wrenches sold individually were not sold at the catalog price, but rather at drastically reduced promotional or sale prices (T. 1902). Plaintiff's own witnesses, including the witness who developed the speculative $44,000,000 profit figure, admitted that they did not know the number and were unable to determine the

selling price of the foregoing wrenches (T. 1409-1410, 1412-1413, 1677, 1679-1680, 1682, 1683). Obviously, plaintiff's $44,000,000 demand is a product of utter speculation. The jury was instructed that its verdict may equal defendant's net profit on the sale of the wrenches (A. 485). It returned a verdict of $1,000,000. That verdict cannot be increased by this Court.

Moreover, the jury was instructed to consider the value of plaintiff's patent in arriving at its verdict (A. 485). However, as demonstrated in defendant's petition for a writ of certiorari, plaintiff's patent is invalid and therefore valueless as a matter of law. Even if, contrary to the fact, it could be said that plaintiff's patent is valid, it is so limited in scope and was so easily avoided by competitors (DX 23, 30, 31, 44, 45, 46) that the verdict was not too low, but excessive.

III.

Plaintiff Is Unable to Challenge the Jury Instruction on Damages for Not Only Did He Not Object to This Instruction, He Tendered It Himself.

Plaintiff's additional argument that the jury verdict was based upon an erroneous damage instruction is clearly unfounded. Not only did plaintiff fail to object to the allegedly improper instruction, he himself tendered the instruction:

> MR. J. DAVIDSON: *I think we would be happy to tender that as modified,* if I might just read it for the record to make sure we have it correct.
>
> "If you find in favor of the Plaintiff on either the first or second claim, then, one of the elements of the money damages to be considered by you may be the net value to the Defendant, the profits or benefits, if derived from the use of Plaintiff's invention and idea. The award of money damages you may make may equal the net profits—" —then continuing on.
>
> THE COURT: That leaves it to the jury to decide.

MR. J. DAVIDSON: *We would be happy to modify it.* (T. 3196, emphasis added.)

It is basic law that one may not attack his own instruction on appeal. *See, e.g., Herman* v. *Hess Oil Virgin Islands Corp.*, 524 F. 2d 767 (3 Cir., 1975); *Scott* v. *Central Commercial Co.*, 272 F. 2d 781 (2 Cir. 1959); *Tendler* v. *Jaffe*, 203 F. 2d 14 (D. C. Cir. 1952), *cert. denied*, 346 U. S. 817 (1953); *Gardner* v. *Darling Stores Corp.*, 138 F. Supp. 160 (S. D. N. Y. 1956), *aff'd*, 242 F. 2d 3 (2 Cir. 1957). Moreover, Federal Rule of Civil Procedure 51 provides that no party may appeal from an instruction unless he objects to the instruction "stating distinctly the matter to which he objects and the grounds of his objection" before the jury retires. Even if it was not so clear that plaintiff had tendered the instruction, he obviously failed to object and to provide the basis for his objection as required by Federal Rule 51. For these reasons too, plaintiff's cross-petition must be denied.

CONCLUSION.

For each of the foregoing reasons plaintiff's conditional cross-petition for a writ of certiorari will not lie and should be denied.

Respectfully submitted,

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